

NORTHWEST ENVIRONMENTAL ADVOCATES



January 16, 2017

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER
Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

Submitted via: FOIA Online

Re: EPA Review and Action on Oregon 319 Plan and Program

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon and across the nation. The organization has a long history of interest and involvement in environmental issues in the Pacific Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns EPA review and actions on Oregon's nonpoint source program under Clean Water Act section 319.

I. FOIA Request

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title,

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subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide *all documents* prepared or utilized by, in the possession of, or routed through EPA related to:

1. Oregon's 319 Nonpoint Source Management Program Plan since 2010.

If there are documents that you suspect we may already have or will not desire, please feel free to call us and ask in order to avoid waste and/or delay. If there are any categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request. For example, NWEA is not interested in documents pertaining to individual grants of 319 funds to third parties.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

A. Whether the subject of the requested records concerns "the operations or activities of the government."

This request concerns documents related to Oregon's 319 program, which is run through EPA grants pursuant to the Clean Water Act. This request concerns the "the operations or activities of the government" because it concerns EPA's oversight and actions on Oregon's use of federal funds for its nonpoint source program. Therefore, this fee waiver request involves records that are readily identifiable as limited to "the operations or activities of the government," specifically in this instance the operations and activities of the U.S. EPA.

B. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.

EPA supposedly operates the 319 program pursuant to the statute and national guidance. There is little evidence of Oregon's being held to the requirements of the statute in EPA's approval of Oregon's latest 319 plan or its annual grants. Therefore, release of the records will most certainly contribute to an understanding of whether and how EPA intends to ensure that its oversight, actions, and funding of Oregon's 319 program conform to federal law. For this reason, reviewing records of EPA's action and rationale on annual and five year planning and funding will be "meaningfully informative" and therefore likely to contribute to an understanding of EPA's view of the statute and Oregon's performance under the statute using federal funds.

Having such information is “meaningfully informative” in that it ensures NWEA does not engage in frivolous or unfounded litigation and so that it can help the public understand whether Oregon has met the requirements of the statute when it obtained federal funds.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals who are most likely to use the information contained within the records. Many Oregon organizations are concerned about nonpoint source pollution, as evidenced, for example, by the large number of public comments submitted to EPA and the National Oceanic and Atmospheric Administration on the two agencies’ proposal to disapprove Oregon’s coastal nonpoint program. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations in Oregon along with permitted dischargers, which may face more stringent effluent limits if nonpoint sources are not regulated and drinking water sources, which may face higher treatment costs if nonpoint sources are not regulated. In addition, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: through the internet from its website, on document sharing sites, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, through formal public comments and other formal documents prepared for agencies, and possibly in litigation. For example, NWEA has sued EPA over its failure to meet statutory requirements pertaining to Oregon’s nonpoint source program. This effort has resulted in significant public processes, posting of information on NWEA’s website, sharing of documents with news reporters, etc.

NWEA’s investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes such as the performance partnership agreements. NWEA’s dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA’s oversight of Oregon’s nonpoint program and use of federal funds. Thus, the release of these records will significantly contribute to the public’s understanding and oversight of EPA’s decision-making under the Clean Water Act.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water pollution trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website (that will be revised and updated in March, 2017).

D. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute “significantly” to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government’s activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). None of the requested information has not, to the best of NWEA’s knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass’n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors’ statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project’s] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM’s position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress’ intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a “close call” as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization’s statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as some of the requested records may include evidence of agency inaction, a court has found that a requestor’s statements concerning the agency’s failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities and inactions of the EPA and its interactions with state regulatory agencies, here Oregon DEQ. In general,

such organizations need to understand how and why a government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in EPA actions and inactions and in state actions. As discussed above, NWEA participates in state processes pertaining to the control of nonpoint sources and in litigation.

This request seeks records concerning EPA's oversight of Oregon's nonpoint program. Obtaining the requested records will allow NWEA to understand EPA's policy or policies and take appropriate action to ensure the requirements of the Clean Water Act are met in Oregon, and elsewhere. Only by understanding the EPA's interpretation of the statute and its own guidance can NWEA meaningfully participate in its public oversight watchdog function. NWEA will also disseminate the information to organizations it works with across the country through listserves, websites, meetings, memoranda, and direct sharing of the records. This issue is of interest to journalists who have covered the question of whether Oregon has adequately regulated nonpoint sources such as logging and farming.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002) (VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. And, NWEA has no vested interest in the outcome of trading programs. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or nbell@advocates-nwea.org if you have any questions about how to respond to this request.

Sincerely,



Nina Bell
Executive Director